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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1977

NO. 77-5176

JEROME FRANKS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF DELAWARE

Donald W. Huntley, Esquire
Assistant Public Defender
Legal Department
E. I. du Pont de Nemours & Company
Wilmington, Delaware 19898

Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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OF THE STATE OF DELAWARE

Petitioner prays that a Writ of Certiorari issue to the Supreme Court of the State of Delaware.

A. The requested Writ is for review of the judgment of the Supreme Court of the State of Delaware reported at 373 A. 2d 578 (1977). A copy of this report is attached as Appendix A.

B. The jurisdiction of this Court is invoked on the basis that a right, privilege or immunity is claimed under the United States Constitution, and the decision in the Court below was against the right, privilege or immunity.

i. The judgment in the court below was made on April 29, 1977, and entered on May 2, 1977.

ii. No order respecting a rehearing nor any order granting an extension of time within which to petition for Certiorari has been granted.

iii. The statutory provision believed to confer jurisdiction on this Court to review judgment by Writ of Certiorari is 28 U.S.C. § 1257(3).

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C. The question presented for review is whether the Trial Court erred in refusing to hear testimony at a suppression hearing which would have shown to be untruthful certain allegations of an affidavit made in support of a search warrant.

D. The Constitutional provision which the case involves is the Fourth Amendment to the United States Constitution, which reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This provision is found in Volume 1, page XLVIII of the Official Edition.

The case further involves the Fourteenth Amendment to the United States Constitution, Section 1, which reads as follows:

> "All persons born or in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This provision is found in Volume 1, page XLIX of the Official Edition.

E. The Petitioner appealed his conviction of First Degree Rape, Second Degree Kidnapping, and First Degree Burglary, on the grounds that the Trial Court erred in refusing to hear certain testimony at a suppression hearing. The conviction was affirmed on appeal by the Delaware Supreme Court.

According to the victim, she was confronted in her home, at about 5:00 a.m., by a knife-wielding assailant who

forced her to perform multiple acts of sexual intercourse with him. The victim later described to the police the clothing worn by the assailant, and identified the Petitioner as the assailant.

A search warrant was obtained by the police and used to seize articles of Petitioner's clothing and a knife, which were introduced at trial over Petitioner's objection. The trial court refused to hear evidence offered at the suppression hearing to impeach the veracity of the affidavit used to establish probable cause for the issuance of the search warrant.

F. The federal question sought to be reviewed was first raised at a suppression hearing before trial. The Petitioner offered to produce testimony that would impeach the veracity of the affidavit used to establish probable cause for the issuance of the search warrant. The trial court refused to hear such evidence. The issue was raised and discussed at pages 4 to 31 of the trial transcript. A copy of this transcript is attached hereto as Appendix B.

G. The petitioner offers the following argument in support of allowance of the writ.

(1) THE INSTANT CASE PRESENTS A QUESTION OF SUBSTANTIAL SIGNIFICANCE THAT HAS NOT PREVIOUSLY BEEN DECIDED BY THIS COURT.

This Court, in Weeks v. United States[1] and Mapp v. Ohio[2], required the exclusion from federal and state courts, respectively, of evidence seized in violation of the Fourth Amendment to the U.S. Constitution. That Amendment prohibits "unreasonable searches" and declares that "...no warrants shall

[1] 232 U.S. 383 (1914).

[2] 367 U.S. 643 (1961).

issue, but upon probable cause, supported by oath or affirmation...". Extensive judicial consideration has been given to the allegations of an affidavit necessary to establish probable cause.[3] However, the extent to which a defendant may go beyond the face of an affidavit supporting a search warrant to challenge the accuracy of the representations in the affidavit is less well defined.

In accordance with Delaware practice and Rule 41(e) of the Federal Rules of Criminal Procedure, an aggrieved person may move to suppress evidence on the ground that there was not probable cause for believing the existence of the grounds on which the warrant was issued. Reason dictates that a determination of probable cause would involve the exploration of the accuracy as well as the sufficiency of the allegations in a supporting affidavit. However, many state courts have disallowed any challenge to the factual validity of an affidavit supporting a search warrant, and a number of federal courts have held that a finding of probable cause by a United States Commissioner is conclusive unless arbitrary, and thus not subject to challenge on the basis of the supporting affidavit's inaccuracy.[4] Other decisions, more in keeping with the fundamental purpose of the Fourth Amendment, indicate that

[3] Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); Brinegar v. United States, 338 U.S. 160 (1949).

[4] Kennev v. United States, 157 F. 2d 442 (D. C. Cir. 1946); Gracie v. United States, 15 F. 2d 644 (1st Cir.), cert. denied, 237 U.S. 748 (1926); United States v. Gianaris, 25 F.R.D. 194 (D.D.C. 1960); United States v. Doe 19 F.R.D. 1 (E. D. Tenn. 1956)

"False facts given by the affiant will vitiate the warrant and the search."[5] Another held that it is for the reviewing court to decide "whether probable cause existed in this case independent of the...honest belief of the officer."[6]

Of those decisions which have denied the opportunity to challenge the truth and accuracy of the facts alleged in an affidavit, the reasoning supporting such holdings does not generally appear in the reported decisions. Typical is Tucker v. State of Maryland[7] in which the Court held simply that they were not persuaded that earlier cases were wrongly decided.[8] Foremost of these earlier cases was Smith v. State[9] in which the court, without elaboration, held

> "The better rule seems to be that the court's consideration of the showing of probable cause should be confined solely to the affidavit itself, and the truth of the alleged grounds cannot be controverted, as was done in the instant case, by receiving the testimony of the accused and other witnesses."[10]

While this Court, in earlier decisions including Weeks and Mapp[11] has provided clear guidance regarding probable cause, it has not yet ruled on the question presented by the instant case. The Court has even gone so far as to suggest the importance of its resolution, saying

> "This Court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavits establish 'probable cause'."[12]

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[5] King v. United States, 282 F. 2d 398, 400 (4th Cir. 1960).

[6] United States v. Henderson, 17 F.R.D. 1 (D.D.C. 1954).

[7] 224 A. 2d 111 (1966).

[8] Ibid., page 118.

[9] 191 Md. 329, 62 A. 2d 287, cert. den. 336 U.S. 925, 69 S. ct. 656 (1949).

[10] Ibid. 62 A. 2d 289.

[11] supra notes 1 and 2.

[12] Rugendorf v. United States, 376 U.S. 528 (1964).

In view of the present uncertainty by lower courts in the administration of Fourth Amendment rights, the Supreme Court's consideration and guidance on this issue is urgently needed.

(2) JUDICIAL REVIEW OF THE TRUTH OF AN AFFIDAVIT SUPPORTING A SEARCH WARRANT IS ESSENTIAL TO GIVE MEANING TO THE FOURTH AMENDMENT GUARANTEES.

a. IF A DEFENDANT IS DENIED THE OPPORTUNITY AT TRIAL TO SHOW THAT ALLEGATIONS OF A SEARCH WARRANT ARE FALSE, THERE IS NO OTHER OPPORTUNITY IN THAT CRIMINAL PROCEEDING TO ASSERT HIS FOURTH AMENDMENT RIGHTS.

Our judicial system is based on the wisdom and inherent fairness of an adversary proceeding; one in which both parties in interest have the opportunity to present their case to an impartial trier of fact. The concept of a final ex parte proceeding was so repugnant to the framers of our Constitution that they included specific prohibitions against bills of attainder[13] that had been so cruelly misused in the past.

The initial hearing for the granting of a search warrant is necessarily an ex parte proceeding. Prior notice of a hearing regarding the initial granting of a search warrant would undoubtedly result in the removal or destruction of evidence. In this ex parte proceeding, however, a judicial determination is made regarding probable cause. The Constitution requires that there be probable cause. This necessarily means that the granting of the search warrant entails a determination of both the sufficiency and accuracy of the allegations in the application. The suppresssion hearing is the first opportunity that the defendant has to present evidence in this matter.

Without complete review of the original determination at a suppression hearing, the accuracy of the allegations supporting the search warrant originally issued would never be

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[13] United States Constitution, Article I, § 9.

considered in an adversary situation. The defendant would never have the opportunity to present, for judicial determination, evidence negating that presented by the State about the accuracy of these allegations. It is submitted that such a situation is contrary to our adversary judicial system and a fundamental concept of fairness.

b. THERE ARE NO SATISFACTORY ALTERNATIVES TO AN ADVERSARY DETERMINATION OF PROBABLE CAUSE AT A SUPPRESSION HEARING.

It has been suggested that a defendant has a remedy against an officer who makes untruthful statements to support a search warrant, in that a criminal action for perjury or civil action for damages are available. However, this Court considered and rejected such arguments many years ago. Then, in reviewing whether it is necessary to exclude evidence obtained without a search warrant, Mr. Justice Black said, in Mapp v. Ohio,

> "There are, of course, other theoretical remedies. One is disciplinary action with the hierarchy of the police system, including prosecution of the police officer for a crime. Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates ordered."[14]

A civil action would seem to be a curious solution to this problem. Suppose, arguendo, that the defendant did bring a civil action against a police officer for damages resulting from the officer's willful misrepresentations in seeking a search warrant. Suppose further that the defendant convinced a jury of his case, and was awarded substantial damages as a result. Reopening the criminal action would clearly be dictated. If these circumstances would warrant reconsideration of the original criminal charges, it is submitted that the interest of justice would be best served if these inquiries were made in the initial criminal proceedings.

[14] supra, note 2.

c. THE FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES IS HOLLOW INDEED IF IT PERMITS THE POSSIBILITY OF EITHER NEGLIGENT OR INTENTIONAL MISREPRESENTATIONS IN SUPPORT OF A SEARCH WARRANT WITHOUT JUDICIAL REVIEW.

Over sixty years ago, this Court considered whether it was constitutionally permissible to introduce evidence obtained without a search warrant. Mr. Justice Day then concluded that if materials so obtained could be "used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures is of no value, and...might well be stricken from the Constitution."[15]

Is there a difference between evidence obtained without a search warrant and evidence obtained with a search warrant that was granted on the basis of negligent or intentional misrepresentations? If there is a difference, we submit that the latter situation does greater violence to the Constitution of our nation. We might sympathize with an officer who enters without a warrant on the certain belief that the fruits or instrumerts of a crime lie within. How can we excuse, however, the officer who would willfully or negligently fabricate an allegation to obtain a search warrant? Without a mechanism to guard against such abuse, our Fourth Amendment rights would very well be "of no value, and might well be stricken from the Consitution."

(3) THE EVIDENCE INTRODUCED IN VIOLATION OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS SIGNIFICANTLY PREJUDICED HIS CAUSE.

In the application for the search warrant issued on March 9, 1976, eighteen facts were alleged to establish probable cause. Of those eighteen facts, it is submitted that only three, Nos. 15, 16 and 17, would provide basis for the belief that physical evidence connected with the crime might be found

[15] Weeks v. United States, supra, note 1.

in the searched premises. These three statements were based on alleged conversations with Mr. James Williams and Mr. Wesley Lucas. The defendant had, at the suppression hearing in the court below, offered to produce evidence that no such conversations took place. Accordingly, the court's refusal to hear such evidence bore on issues central to the sufficiency of the affidavit supporting the application for a search warrant.

As a result of the search carried out pursuant to the warrant in question, a knife and several articles of clothing were discovered which generally corresponded to the description of these items by the victim. At trial, they represented the only tangible evidence submitted to the jury. In view of this central role of the evidence at the trial, the violation of defendant's right against unreasonable searches and seizures can be rectified only by a new trial excluding the tangible evidence obtained as a result of this search.

(4) CONCLUSIONS

It is respectfully submitted that if the Fourth Amendment is to succeed in its stated purpose of protecting the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...," a review of the validity of an affiant's allegations in addition to their sufficiency is required, in accordance with carefully reasoned opinions such as King v. U.S.[16] in which the court concluded, "The constitutional requirement of an oath or affirmation would be effectively eroded away if fictitious oaths were permitted."[17]

Innocent misrepresentations, to the extent that an affiant believed the misrepresentations to be true, do not do violence to the Fourth Amendment. However, it is respectfully

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[16] 282 F. 2d 398 (1960).

[17] Ibid., page 399.

submitted that every material misstatement made either intentionally or negligently by an affiant should require exclusion of the evidence obtained as a result of such misstatement. Such exclusion is necessary to deter such intentional or negligent misstatements to adequately preserve the constitutionally guaranteed rights against unreasonable searches and seizures.

In view of the importance of the issues presented in this case and the absence of earlier instruction by the Court, granting of the Writ of Certiorari is indicated.

H. A copy of the Opinion of the Supreme Court of the State of Delaware delivered upon rendering of Judgment sought to be reviewed is appended hereto as Appendix C. Included in this Opinion is the judgment or decree in question.

In view of the foregoing, the issuance of a Writ of Certiorari is earnestly solicited.

Respectfully submitted,

Donald W. Huntley

Donald W. Huntley

Counsel for Petitioner

APPENDIX A

Franks v. State of Delaware decision as reported at 373 A. 2d 578.

about escape or removal of anything to be searched for. We also note that there was no factual basis for the search during the night under the circumstances shown in this record. Defendant was in custody of the police (on a disorderly conduct charge) when eight police officers descended on his trailer home at 11:30 P.M. while only his wife was there. Nothing whatever appears in this record to justify that intrusion.

[5, 6] It follows from this analysis that all evidence seized during the course of the search must be suppressed. This includes the Bearcat Scanner which was the principal target of the warrant. The scanner was noticed earlier in the day by a police officer while he was in defendant's trailer executing the arrest warrant for disorderly conduct. The officer recorded the serial number and subsequently ascertained that the scanner was stolen. It was seized during the search in issue here.

As to this piece of evidence, it is necessary to distinguish between its discovery and subsequent seizure. The discovery was not unlawful or tainted since it was in plain view of the Trooper who was lawfully present in defendant's trailer at the time of observation. But not so as to the seizure. The propriety of the seizure turns on the legality of the entry into the trailer at the time of seizure. And because the police were without authority to enter defendant's home during the night, it follows that they were without authority to seize the scanner *at that time*.[3] We conclude, therefore, that the scanner is a fruit of an unlawful search and seizure and, accordingly, must be suppressed. *Pierson*, supra at 574.

The judgment of the Superior Court is reversed and the case remanded for proceedings consistent herewith.

Jerome FRANKS, Defendant Below, Appellant,

v.

STATE of Delaware, Plaintiff Below, Appellee.

Supreme Court of Delaware.

Submitted March 16, 1977.

Decided April 20, 1977.

Defendant was convicted before the Superior Court of first-degree rape, second-degree kidnapping, and first-degree burglary, and he appealed. The Supreme Court, McNeilly, J., held that no attack upon veracity of underlying affidavit establishing probable cause for search warrant which was not attacked on its face could be made by defendant at suppression hearing.

Affirmed.

1. Searches and Seizures ⇐3.9

No attack upon veracity of underlying affidavit establishing probable cause for search warrant which was not attacked on its face could be made by defendant at suppression hearing in prosecution for first-degree rape, second-degree kidnapping and first-degree burglary; matters asserted by defendant were more properly considered at trial on merits. U.S.C.A.Const. Amend. 4; 11 Del.C. §§ 764, 783, 826.

2. Searches and Seizures ⇐3.5

It is function of issuing magistrate to determine reliability of information and credibility of affiants in deciding whether requirement of probable cause for issuance of search warrant has been met. U.S.C.A. Const. Amend. 4.

3. Criminal Law ⇐394.6(3)
Searches and Seizures ⇐3.5

Neither probable cause nor suppression hearings are adjudications of guilt or innocence.

3. To support the validity of the seizure, the State asserts the well established "plain view doctrine." However, this is not helpful to the State since an essential element of the doctrine is lacking, namely, the police were not lawfully present in the trailer at the time of seizure of the scanner. *Miller v. State*, Del.Supr., 310 A.2d 867, 869 (1973).

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Upon appeal from Superior Court. Affirmed.

Donald W. Huntley, Asst. Public Defender, Wilmington, for defendant below, appellant.

Harrison F. Turner, Deputy Atty. Gen., Dover, for plaintiff below, appellee.

Before HERRMANN, C. J., and DUFFY and McNEILLY, JJ.

McNEILLY, Justice:

Defendant appeals his conviction by a Superior Court jury of first degree rape, 11 *Del.C.* § 764,[1] second degree kidnapping, 11 *Del.C.* § 783,[2] and first degree burglary, 11 *Del.C.* § 826,[3] contending that the Trial Court erred in refusing to hear impeachment testimony at a suppression hearing. We disagree.

I.

According to the victim, she was confronted in her home, at about 5:00 a. m., by a knife-wielding assailant who forced her to perform multiple acts of sexual intercourse with him. The victim later described to the police the clothing worn by the assailant and identified defendant as the assailant.

A search warrant was obtained by the police and used to seize articles of defendant's clothing and a knife, which were introduced at trial over defendant's objection. The Trial Court refused to hear evidence offered at the suppression hearing to impeach the averments of the affidavit used to establish probable cause for the issuance of the search warrant.

At trial, defendant did not deny that he had had intercourse with the victim, asserting the defense of consent.

II.

[1-3] Defendant contends that the Trial Court erred in refusing to hear testimony at the suppression hearing which would have impeached the affidavit establishing probable cause for the search warrant; that this violated the Fourth Amendment prohibition against unreasonable searches and seizures and the requirement that no search warrant shall issue but upon probable cause, supported by oath or affirmation. There is no attack upon the validity of the warrant on its face, and the United States Supreme Court has left open the extent to which a supporting affidavit may be challenged for accuracy. *Rugendorf v. United States*, 376 U.S. 528, 531-32, 84 S.Ct. 825, 827-28, 11 L.Ed.2d 887, 891 (1964). The majority of the jurisdictions considering this question have decided that no attack upon the veracity of an underlying affidavit may be made.

1. 11 *Del.C.* § 764 provides:
"A male is guilty of rape in the first degree when he intentionally engages in sexual intercourse with a female without her consent, and
"(1) In the course of the offense he inflicts serious physical, mental or emotional injury upon the victim, or
"(2) The victim was not the defendant's voluntary social companion on the occasion of the crime and had not previously permitted him sexual contact."
"Rape in the first degree is a class A felony."

2. 11 *Del.C.* § 783 provides:
"A person is guilty of kidnapping in the second degree when he unlawfully restrains another person with any of the following purposes:
"(1) To hold him for ransom or reward; or
"(2) To use him as a shield or hostage; or
"(3) To facilitate the commission of any felony or flight thereafter; or
"(4) To inflict physical injury upon him, or to violate or abuse him sexually; or
"(5) To terrorize him or a third person;
and the actor voluntarily releases the victim alive, unharmed, and in a safe place prior to trial."
"Kidnapping in the second degree is a class B felony."

3. 11 *Del.C.* § 826 provides:
"A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or in immediate flight therefrom, he or another participant in the crime:
"(1) Is armed with explosives or a deadly weapon; or
"(2) Causes physical injury to any person who is not a participant in the crime."
"Burglary in the first degree is a class B felony."

A-2

See 68 Am.Jur.2d *Searches and Seizures* § 66 (1973). We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are more properly considered in a trial on the merits. See *State v. Petillo*, 61 N.J. 165, 293 A.2d 649 (1972), cert. denied, 410 U.S. 945, 93 S.Ct. 1388, 35 L.Ed.2d 611 (1973); *Carter v. State*, 274 Md. 411, 337 A.2d 415 (1975).

Because of the resolution of this issue there is no need to consider defendant's other contentions, relating to the evidence that would have been introduced for impeachment purposes.

Affirmed.

George R. CANNON, Plaintiff,
v.
The DENVER TRAMWAY CORPORATION, Defendant.

Court of Chancery of Delaware, New Castle.

Submitted Oct. 10, 1976.
Decided Jan. 5, 1977.
Reargument Denied Jan. 24, 1977.

Trustee in dissolution of dissolved corporation sought instructions from court as to an appropriate distribution of corporate funds over and above amounts required to pay corporate obligations. The Court of Chancery, in and for New Castle County, Marvel, Chancellor, held that under dissolved corporation's plan of liquidation, court order creating office of trustee, document transferring assets from the corporation to the trustee, and trustee's declaration and acknowledgment, which provided for trustee to hold all funds for benefit of stockholders, legal title to assets was to be held by trustee while beneficial interest was to rest with former shareholders and, thus, income earned by investment of fund would be allocated among former stockholders in proportion to their equitable interest therein and preferred stockholders would be entitled to receive same compound interest which had been received by trustee as a result of his investment of trust funds.

Order to be presented.

1. Corporations ⇐629

Under dissolved corporation's plan of liquidation, court order creating office of trustee, document transferring assets from the corporation to the trustee, and trustee's declaration and acknowledgment, which provided for trustee to hold all funds for benefit of stockholders legal title to assets was to be held by trustee while beneficial interest was to rest with former shareholders and, thus, distribution of sum representing interest income earned on assets of dissolved corporation in hands of trustee would be allocated among all former stockholders in proportion to their equitable interest therein, notwithstanding rule of law that preferred shareholders are limited upon dissolution to contractual preference set forth in their corporation's certificate of incorporation and therefore are not entitled to participate in distribution of residue of corporate assets to common shareholders after payment of liquidation preferences.

2. Trusts ⇐173

Trustee must deal impartially with several beneficiaries of a trust.

3. Corporations ⇐629

Duty of trustee of dissolved corporation to maintain reserves for contingent liability would not militate against fact that in a liquidation receivership the actual own-

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APPENDIX B

Pages 4-31 of the Trial Transcript

but we will take a five-minute recess at this time.

(A recess was here taken.)

Courtroom No. 2
11:20 o'clock a.m.
The same day.

PRESENT: As before noted.

THE COURT: The State of Delaware versus Jerome Franks, motion to suppress. Mr. Finocchiaro, you may proceed.

MR. FINOCCHIARO: Your Honor, first of all I would ask witnesses be sequestered during this hearing.

THE COURT: You may step outside in the hallway.

(The witnesses left the courtroom.)

MR. FINOCCHIARO: Initially, the Defense would like to call Detective Brooks to the stand.

THE COURT: Isn't this a motion to suppress the search warrant because it was not sufficient?

MR. FINOCCHIARO: Yes, Your Honor.

THE COURT: Then we are arguing about the contents of the search warrant, are we not?

MR. FINOCCHIARO: That is correct, Your Honor. I intend to produce testimony along those lines.

THE COURT: What is the need for testimony is

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the next question if we are talking about whether the search warrant is sufficient?

MR. FINOCCHIARO: Your Honor, I have two particular reasons.

THE COURT: We are putting this on the record. We have discussed it the other day.

MR. FINOCCHIARO: I question the validity of certain of these points stated in the preliminary hearing -- I'm sorry. I question the validity of some of the points made in the affidavit in this case that was involved in issuing the search warrant and, in addition, I question whether or not there was a prior potential violation of Mr. Franks' right whereby the fruit of the poisonous tree aspect may apply.

THE COURT: Anything further?

MR. FINOCCHIARO: They are the points, Your Honor, that I have. I intend to produce witnesses along these lines.

THE COURT: Is the search warrant in the file?

MR. FINOCCHIARO: I don't know if it is in your file or not, Your Honor.

THE COURT: It is not attached to your motion.

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MR. FINOCCHIARO: Apparently not.

THE COURT I cannot rule upon it unless I can have it.

MR. FINOCCHIARO: The only copy I have, Your Honor, does have various notes made by me. I don't know if the Attorney General would have an unmarked one or not.

MR. TURNER: I have just one copy, but I would be glad to furnish it to the Court. Both the Court and I can use it I guess. I would like to respond if I may.

THE COURT: Let me see if I can make it clear. You feel certain matters in the motion to suppress are not correct and you wish to present evidence to show they are not correct.

MR. FINOCCHIARO: Yes, Your Honor. I believe a good portion of the information obtained in this affidavit is totally irrelevant to issuance of a search warrant and certain factors that were relied upon, I would say the stronger factors, some of them are incorrect and that there was misrepresentations made in the affidavit.

Further, another particular comment in Paragraph No. 8. I question whether or not there may have been any prior violations of Mr. Franks' rights such that whatever information they obtained, if it was obtained

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unconstitutionally, could not be used as subsequent probable cause in the issuance of the search warrant.

MR. TURNER: May it please the Court. In response, may I point out that initially in the ruling upon the search warrant our Supreme Court has stated in Pearson vs. State that sections 2306 and 2307 of 11 Delaware Code, like Federal Criminal Rule 41e contemplate a "four corners" test for probable cause. Sufficient facts must appear in the face of the affidavit so Magistrate's personal knowledge, notwithstanding a reviewing court, can verify the existance of probable cause. Thus, one looks only to the facts recited in the Complaint.

Thus, this is the interpretation that our Supreme Court has stated with respect to probable cause, looking only to the facts recited in the Complaint. You have a four corners test.

Now, as to Mr. Finocchiaro's wanting to call witnesses, may I refer the Court to first of all 68 AmJur 2nd Page 720. The Supreme Court --

THE COURT: Let's complete the record. What witnesses do you wish to call, and would you make a proffer of what they will testify to, Mr. Finocchiaro?

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MR. FINOCCHIARO: Yes, Your Honor. Would you like for me to limit myself -- or, first of all I will address what Colonel Turner has stated.

THE COURT: Not yet. Why don't you make your proffer and then we can delineate the issues.

MR. FINOCCHIARO: Your Honor, I intend to produce Mr. Wesley Lucas of the Delaware Youth Center and Mr. James Morrison, formerly of the Delaware Youth Center, who I believe will give information that will intend to impeach the information contained in the affidavit, not only as to its accuracy but to the fact it was never given and as such there may have been a rather material misrepresentation made by either one or both of the affiants contained in the search warrant. In addition, I would like to call Officer McClements to the stand.

THE COURT: That would be of what paragraph? Paragraph 15?

MR. FINOCCHIARO: Yes, Paragraphs 15, 16 and 17.

THE COURT: And what they would testify to would rebut what is in Paragraph 15, 16 and 17.

MR. FINOCCHIARO: Would rebut not only certain

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factual matters, but also as to whether or not it was given and to whom it was given and in addition in Paragraph number 8 --

THE COURT: In other words, they will say that none of that information was given?

MR. FINOCCHIARO: They will testify that neither one of them to the best of their knowledge gave this information to either of the affiants contained in this affidavit, and additionally that the information that they did give was somewhat different than contained in the affidavit and was not to an officer who even swore out the affidavit and that what was stated in there is not an accurate representation of precisely what they said.

THE COURT: So will you have other witnesses?

MR. FINOCCHIARO: Yes. I also intend to call Officer McClements of the Dover Police Department in reference to Paragraph No. 8. I feel that there should be a showing of absence of taint because I think the case law is clear that if something is obtained in violation of constitutional rights that cannot be used later to show probable cause in the issuance of a search, of an arrest or a search warrant, and basically then I

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would possibly or potentially produce testimony of Mr. Franks. But they are the witnesses I would like to call. In addition I would like to call Detective Brooks.

THE COURT: What is your proffer of Mr. Franks?

MR. FINOCCHIARO: Mr. Franks will dispute some of those factors in there.

THE COURT: Which factors?

MR. FINOCCHIARO: Well, let me put it this way, Your Honor. I do not know what Officer McClements will testify to. His proffer will depend on the testimony of Officer McClements. I do not know whether he would agree or disagree with what he has to say.

THE COURT: You want to call Officer McClements, I presume, as a hostile witness, to examine him as to the contents of Paragraph No. 8?

MR. FINOCCHIARO: That is correct.

THE COURT: Now, we have delineated exactly what the Defendant intends to proceed on here.

MR. FINOCCHIARO: And, Your Honor, one additional point, I would anticipate calling Detective Brooks to question him as to the comments that he made in Paragraphs 15, 16 and 17, and I would also, as previously mentioned,

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cal. both Mr. Morrison and Mr. Lucas in that same regard.

MR. TURNER: I will first approach this problem from the standpoint of whether Mr. Finocchiaro is entitled to call any witnesses.

As I have pointed out on probable cause, Pearson vs. State is the latest case on that and I have already recited that. It is to be based on the four corners.

Now, the motion we have before us is in connection with suppression which Mr. Finocchiaro has enlarged upon that. He wants to test the validity of the statements in the affidavit.

I would like to refer the Court to the pertinent authority first, and I start off with 5 ALR 2nd Page 396. In absence of a statute the general rule basically -- Delaware has no statute which would embrace this particular area. The cases involving the problem under annotation exhibit a number of different ways by which the question is actually presented to the appellant courts. All proceed on the assumption that after execution of the search warrant criminal proceedings have been brought.

A motion to quash the search warrant is one of

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the ways of attacking.

I come to the key involving these various methods of raising the question, exhibiting the different specific challenges to the matter. In the supporting affidavit or complaint mentioned are a large number of decisions which represent an overwhelming majority of the cases decided apart from applicable statutes supporting the view that the matters contained in an affidavit or verified complaint on which a search warrant is based may not be questioned or disputed by the person against whom the warrant is directed. Citations on that: Illinois, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Oklahoma -- many cases under each -- Rhode Island, Tennessee, Texas, Washington, throughout the entire jurisdiction.

One particular case that comes to my attention, it is a Maryland case, Tucker vs. State 224 A. 2nd 111 certiorari denied, 386 U.S. 1024.

The better rule seems to be that the Court's consideration of the showing of probable cause should be confined solely to the affidavit itself and the truth of the alleged ground stated in the affidavit cannot be

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controverted by receiving the testimony of the accused and of the witness. As I have said in Pearson vs. State one only looks to the facts recited in the affidavit in support of the search warrant.

I now pass to 68 AmJur 2nd at page 625. The Supreme Court of the United States has not directly passed upon the question as to the extent to which a court may permit an attack upon the supporting affidavit for a search warrant where the warrant is valid on its face and the allegations of the affidavit, assuming them to be true, establish probable cause.

Rugendorf vs. the United States, 376 U.S. 528 held that even if such attack is proper it cannot be based on factual inaccuracies which are of only peripheral relevancy to showing of probable cause and which do nothing to the integrity of the affidavit.

A majority of the state courts which have considered the problem have held that in the absence of statute the matters contained in an affidavit in which the search warrant is based may not be disputed by the person against whom a warrant is directed for the purpose of showing the invalidity of the warrant. Citations:

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PAGE A – 14 WAS NOT AVAILABLE AT THE TIME OF FILMING; HOWEVER, IT IS REPRINTED IN FULL IN THE SEPARATE APPENDIX.

ground that, one, the property was illegally seized without warrant which doesn't apply here or, four, there was not probable cause for believing the existance of the ground upon which the warrant was issued. There is the difference. Therefore, the Federal courts and certain cases have considered whether or not testimony could be taken in support of the affidavit.

The 4th, 6th, 7th and 8th Circuits, which I have the cases here: the 7th Circuit, United States vs. Carmicheal 489 F. 2nd 983, 1973; the 6th Circuit, United States vs. Luna 525 F. 2nd 4 1975; the 4th Circuit, United States vs. Lee 19 Criminal Law 2193, just decided in May; the 8th Circuit, United States vs. Marehart 492 F. 2nd 897. These Circuits all agree that only the deliberate inclusion of false statement or wreckless inclusion of false statement material to the establishment of probable cause. They take into consideration: Did the officer intend to deceive the magistrate? If such is so, then and there must be a showing of such before even a hearing is awarded.

The 5th Circuit and the 2nd and 1st Circuits: 5th Circuit in United States vs. Thomas 489 F. 2nd 664 also includes the misstatement with the intent to deceive

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the magistrate must be involved.

Now, these cases are analyzed under United States vs. Lee which appears in 16 Criminal Law at page 2311 entitled: Search Warrant Challenges the Truthfulness of Supporting Affidavit. They analyzed these cases.

However, I am pointing out that even in the Federal where it is much stricter than what Mr. Finocchiaro tries to do here today, much stricter, they are still interpreting a different Rule 41e which we don't have.

I reiterate again all State courts, majority of State courts that have considered this question, have decided that you cannot go behind the affidavit. The Maryland court, which I have just cited as the most recent case in the nearest jurisdiction, but the jurisdictions which have ruled upon this are numerous, and as I quote from the authorities they have stated that you cannot go behind the truth of the warrant.

One case stated it just may not be disputed upon the facts that exist in the search warrant; therefore the State would contend that the only thing before this Court, both by the motion of the Defendant and by case law, is to decide on the four corners of this search

warrant application and the affidavit, whether it establishes probable cause and under these considerations I submit to the Court that under United States vs. Ventresca the Court must read the search warrant as a practical and not an abstract thing.

They must be tested and interpreted by the Magistrate Court in a common sense and realistic fashion. This is taken from United States vs. Ventresca 380 U.S. 102.

Quoting from Jones vs. United States 362 U.S. 257, 260, "A warrant must be looked at from a reasonable fashion." In that particular case they admit it. Affidavits are not drawn by lawyers but only by policemen not educated under the stress of need, and not educated as an attorney and they must be looked at realistically in order to arrive at whether or not probable cause has been established.

Under those circumstances I submit to the Court that the four corners of this warrant are the only thing to be considered at this time and the Court must consider and find probable cause is established by the warrant.

THE COURT: So he is calling his first witness. You are in effect objecting to the relevancy of the proposed witness?

MR. TURNER: I am objecting to his going behind it in any way. I am stating that before the Court is a motion which it must decide on the four corners as indicated by Pearson and that is it.

MR. FINOCCHIARO: Your Honor, first of all the State has mentioned the use of the four corners test. I think that goes to an entirely different factor than what we have presented here.

I think the four corners test questions whether or not there can be, the affidavit can be supplemented by material presented to the Magistrate. In other words, supplemented orally, matters not contained in it, and the Court as a matter of practical necessity said that is ridiculous. Quite simply, how can we review, a higher court review what was said if it was only said orally? We must go by the affidavit.

This I feel is an entirely different aspect and as such it is not controlled by the four corners test at all and this point, as previously indicated, goes

whether I, the Defense, may present evidence not presented to the Magistrate that impeaches the representation of the affidavit.

I would like to bring to the Court's attention the United States Supreme Court case: North Carolina v. Renzi, June 17, 1974. It was for a petition for a writ of certiorari which was denied. In an opinion by Justice White he denied the writ for certiorari and went on to say, on the second page of that opinion on 94 Supreme Court Reporter 3182, "Whether a search warrant and supporting affidavit are adequate on their face may later be impeached is squarely presented here. The time is ripe for decision on this question for the courts are in conflict and the question is important for the proper administration of criminal justice." Unfortunately, Justice White did not go on to decide that particular question that I am aware.

He also points out in this, the United States Supreme Court case of Rugendorf vs. United States which does leave the question unsettled, but there it was talking about issues of peripheral relevancy.

I would also like to point out that some of

the cases cited indicate that -- Steele vs. United States 267 U.S. 498 I feel can be interpreted to indicate the challenger may present evidence although Rugendorf as previously mentioned does treat the matter as unsettled.

North Carolina vs. Renzi previously mentioned does collect the views and indicates there is a vast disagreement among the states. It is ripe for consideration, it is ripe for decision. It has not been so and apparently, to the best of my research and apparently for the State's, for that matter has not been determined by this State.

Further, I think we are not talking about a matter of peripheral relevance here. The affidavit indicates that personal information, personal contact was made with certain witnesses and certain information was obtained. I intend to produce evidence that the person who said that did not personally contact those individua at all, and I think this is not dealing with peripheral relevancy. As such, I feel that there may have been at least some misrepresentation to the Magistrate from wha I have been told that in fact they didn't even contact that person. They may have had some other information

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a little bit different, but obtained through another police officer and they learned of it, but nevertheless apparently a misrepresentation to the Magistrate in the court below and I don't feel that is dealing with the peripheral relevancy.

I think any magistrate would be extremely upset if a police officer gave him an affidavit and it turned out later that officer did not obtain that information personally like the way he said it was. And, in addition, like I said, I think this issue is ripe at this time. I am taking the words of Justice White in that matter.

Further, I feel we have an additional problem here and that is that if the information obtained in Paragraph No. 8 was obtained in violation of constitutional rights that that should not later be used as probable cause to be used in the issuance of a search warrant. Since this matter has not been presented, I question whether this court can merely say: Well, if some courts do not allow it and some courts do I will merely go by the majority without some type of independent evaluation by this court, and I feel that since we are not talking

about peripheral relevancy, but basic misrepresentation, this court should hear this testimony and make a decision on it.

MR. TURNER: I would like to answer that briefly. Just because Justice White has stated it is time for the Supreme Court of the United States to decide this case, it seems to me to be putting a hell of a burden on this court to step in and do what the Supreme Court has not.

In the Harvard Law Review article that I cited, it states, "It is deplorable at this late date. The law is in the state of confusion of whether the validity of the search warrant affidavit may be challenged. Motions to suppress evidence are made daily in trial courts, state and federal, with the law so unsettled results vary from judge to judge. Respect for the judicial process must suffer. The time is ripe for the Supreme Court to clarify this important question."

In Rugendorf the Court assumed arguendo that such a challenge was available. Due respect for the fourth amendment protection against unreasonable searches should lead the Court now to give its assumption

the dignity of a firm holding.

In other words, this Law Review Article which is quite comprehensive states that it is ripe. Justice White states it is ripe, but nevertheless it hasn't been decided.

In the meantime, all State courts throughout the entire country, the jurisdictions have stated that it is not subject to attack and the various authorities on this case state that as I stated to you from AmJur 2nd, as I stated from 5 ALR 2nd. They are taking the cases in the different jurisdictions and they find the State courts have universally almost, there are a few isolated occasions where they have allowed it in, but the universal: No.

Now, the mere fact it might be ripe for decision in the Supreme Court of the United States should have no bearing on this court sitting here.

It is the contention of the State that this court should follow those lines or cases which are by far the majority view and under those circumstances the testimony is not admissible in connection to test the validity of the warrant.

I might state that Mr. Finocchiaro is arguing

about peripheral and nonperipheral which is taken from Rugendorf which approach the question, but did not decide it. So it is still up in the air. So whether it is peripheral or not is still beside the point.

The point is whether he can introduce testimony, and with all the state jurisdictions ruling against it I feel that this court would join the majority rather than the distinct and definite minority.

MR. FINOCCHIARO: Your Honor, if I may briefly respond. First of all, Colonel Turner made one statement which I think he later altered slightly. I think he said all courts have said that it is not, cannot be challenged and I think he has indicated it is a majority. That is apparently incorrect. There are states that will allow the court or allow the Defendant, as the case may be, to challenge the affidavit. Included among those cases are: Alabama, California, New York and Pennsylvania and initially when he made the statement "all" apparently Delaware has not ruled on this issue and I don't think the court can merely toss a coin and say: If it is six to five or ten to five, whatever the case may be, then therefore that is the proper course to follow without

some type of independent evaluation. But I would like to go on.

Let me say that basically what I am indicating is not only a factual discrepancy, but I would say that there has been some type of misrepresentation as to what that police officer personally learned and related to the Magistrate, and I think that does make a stronger case where there is some type of bad faith or misrepresentation, and I am basing this solely on the information that is provided me by my witnesses. I have not talked to Detective Brooks about this. I don't know what his position is, but nevertheless I feel this issue is ripe.

I think Colonel Turner has indicated that and I don't think this court, where it has never been addressed to this court, can merely indicate if other states do it that way I would just go by the majority and disregard the minority and handle it in that fashion.

MR. TURNER: Most of those minority states have statutes which are invoked.

THE COURT: I am going to sustain the State's objection. You may proceed.

MR. FINOCCHIARO: Your Honor, I would like to

make a witness proffer if the Court would be allow.

THE COURT: You have already made a proffer.

MR. FINOCCHIARO: That is a lawyer proffer. I would like to make a witness proffer.

THE COURT: What is the difference.

MR. FINOCCHIARO: Well, I think they would perhaps state a little bit more emphatically.

THE COURT: Have the witnesses come in and tell us?

MR. FINOCCHIARO: Yes. I made my proffer, Your Honor, but I would still like to make a witness proffer.

MR. TURNER: May I suggest the Court has just ruled that that is exactly what it can't do.

THE COURT: All right. That is denied. Proceed.

MR. FINOCCHIARO: Your Honor, you have ruled apparently that regardless there is factual inaccuracies or misrepresentations in here that I am not allowed to challenge it. Nevertheless, I still question if your ruling goes to the effect that if there was a violation of Mr. Franks' rights, and I am talking in reference to Paragraph No. 8, and as such is tainted evidence, whether

...not the Court is going to allow me to examine whether or not there was any taint. In other words, whether or not it should be excluded from the search warrant. Perhaps I should repeat that.

In addition to my other argument there may be inaccuracies or misrepresentations, I feel that perhaps in reference to Paragraph No. 8 there may have been a violation of Mr. Franks' constitutional rights. I feel that evidence was tainted and that it should not be used as probable cause in the later obtaining of a search warrant.

I don't know if your ruling has precluded me from that also.

MR. TURNER: As I understand it, we are now at the position where the Court is about to decide the validity of the search warrant on the four corners; therefore, that issue seems to be the only one before the Court.

THE COURT: I presume he has some further comments as to Paragraph No. 8 in which I presume Mr. Finocchiaro was saying this was not argued and he wishes to present argument on Paragraph No. 8 as to facts. You wish to present evidence to show that the information

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...tained in Paragraph No. 8 was obtained in violation of Defendant's constitutional rights.

MR. TURNER: Isn't he going back beyond the search warrant in that case to establish the validity of these things which, as I understand it, we have just finished arguing? The Court has made its ruling. Is the Court going to allow him to go back and present testimony as the validity of the search warrant?

It is my understanding we are here on a suppression hearing. It is my further understanding that we have argued as to whether he can go back and present testimony as to the validity of those items in the search warrant. It is my further understanding the Court has ruled against it.

Now, we are at the position where, as I see it, before the Court is now the search warrant for decision as to whether it establishes probable cause without the necessity or actually the permission to call witnesses.

THE COURT: Is there additional argument you wish to make as to Paragraph No. 8 that you have not made?

MR. FINOCCHIARO: Yes, Your Honor.

point out in a little bit more detail precisely
hat my position is. In other words, I am stating
that if the statement that was made, contained in Paragraph
, I was unconstitutionally obtained that is perhaps in
violation of Miranda rights or voluntariness standard
or whatever constitutional rights referring to it is
tainted evidence and that may not be used to support a
subsequent probable cause to determination of the issue
of the warrant.

THE COURT: You have indicated you have not argued this point before?

MR. FINOCCHIARO: Your Honor, I preface this by saying I do not know if your ruling takes this under its umbrella if you will.

THE COURT: The answer is yes.

MR. FINOCCHIARO: In other words, your ruling is that regardless of any factual inaccuracies or misrepresentations, that if there is unconstitutionally obtained evidence that may be used to obtain a search warrant? Is that what your ruling is, Your Honor? In other words, I have case law which I think seems to indicate to the contrary.

MR. TURNER: I think all the Court has ruled is that they can't go behind the search warrant without making any ruling about constitutional, unconstitutional or anything else. It is just the Defendant is barred from going behind the search warrant.

THE COURT: That is correct.

MR. FINOCCHIARO: Your Honor, there are cases after cases which talk about an illegal search and then goes on to determine that what was found during that illegal search cannot be used as probable cause for a subsequent search. Now, how can you determine that the second search was invalid unless you look and determine what the first search was and that is the problem that I am faced with this morning.

MR. TURNER: There is no previous search that I know of.

MR. FINOCCHIARO: I am talking about case law, talking about fourth amendment, fifth amendment. I think the argument is equally applicable.

THE COURT: Anything further, counsel?

MR. FINOCCHIARO: I have nothing further, Your Honor.

MR. TURNER: I think the Court has already ruled.

THE COURT: Nothing further on the merits of the search warrant?

MR. FINOCCHIARO: I am sorry, Your Honor. My comments were just limited to my argument as to whether or not I could show factual inaccuracies or misrepresentations or whether I could show unconstitutionally obtained evidence should not be used as probable cause in the later issuance of the search warrant. Since the Court apparently has denied my motions in both of those areas I would like to review this search warrant very basically with the Court.

I would say that perhaps the entire portion of this affidavit is totally irrelevant to the issue at hand. Paragraph No. 1 talks about a Brenda Bradley. I feel that it is totally irrelevant.

Paragraph No. 2. Investigation of that Complaint in Family Court is conducted by Detective Boyce Failing. Totally irrelevant.

Paragraph No. 3. Investigation revealed that he, that Branda Bradley was at 222 South Governor's Avenue.

APPENDIX C

Opinion of Delaware State Court

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEROME FRANKS,	§	
Defendant Below, Appellant,	§	
v.	§	No. 259, 1976
STATE OF DELAWARE,	§	
Plaintiff Below, Appellee.	§	

Submitted: March 16, 1977
Decided: April 29, 1977

Before HERRMANN, Chief Justice, DUFFY and McNEILLY, Justices.

Upon appeal from Superior Court. Affirmed.

Donald W. Huntley, Assistant Public Defender, Wilmington, for defendant below, appellant.

Harrison F. Turner, Deputy Attorney General, Dover, for plaintiff below, appellee.

McNEILLY, Justice:

Defendant appeals his conviction by a Superior Court jury of first degree rape, 11 Del.C. § 764,* second degree kidnapping, 11 Del.C. § 783,** and first degree burglary, 11 Del.C. § 826,*** contending that the Trial Court erred in refusing to hear impeachment testimony at a suppression hearing. We disagree.

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* 11 Del.C. § 764 provides:

"A male is guilty of rape in the first degree when he intentionally engages in sexual intercourse with a female without her consent, and

"(1) In the course of the offense he inflicts serious physical, mental or emotional injury upon the victim, or

"(2) The victim was not the defendant's voluntary social companion on the occasion of the crime and had not previously permitted him sexual contact."

"Rape in the first degree is a class A felony."

** 11 Del.C. § 783 provides:

"A person is guilty of kidnapping in the second degree when he unlawfully restrains another person with any of the following purposes:

"(1) To hold him for ransom or reward; or

"(2) To use him as a shield or hostage; or

"(3) To facilitate the commission of any felony or flight thereafter; or

"(4) To inflict physical injury upon him, or to violate or abuse him sexually; or

"(5) To terrorize him or a third person;

and the actor voluntarily releases the victim alive, unharmed, and in a safe place prior to trial."

"Kidnapping in the second degree is a class B felony."

*** 11 Del.C. § 826 provides:

"A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or in immediate flight therefrom, he or another participant in the crime:

"(1) Is armed with explosives or a deadly weapon; or

"(2) Causes physical injury to any person who is not a participant in the crime."

"Burglary in the first degree is a class B felony."

I.

According to the victim, she was confronted in her home, at about 5:00 a.m., by a knife-wielding assailant who forced her to perform multiple acts of sexual intercourse with him. The victim later described to the police the clothing worn by the assailant and identified defendant as the assailant.

A search warrant was obtained by the police and used to seize articles of defendant's clothing and a knife, which were introduced at trial over defendant's objection. The Trial Court refused to hear evidence offered at the suppression hearing to impeach the averments of the affidavit used to establish probable cause for the issuance of the search warrant.

At trial, defendant did not deny that he had had intercourse with the victim, asserting the defense of consent.

II.

Defendant contends that the Trial Court erred in refusing to hear testimony at the suppression hearing which would have impeached the affidavit establishing probable cause for the search warrant; that this violated the Fourth Amendment prohibition against unreasonable searches and seizures and the requirement that no search warrant shall issue but upon probable cause, supported by oath or affirmation. There is no attack upon the validity of the warrant on its face, and the United States Supreme Court has left open the extent to which a supporting affidavit may be challenged for accuracy. Rugendorf v. United States, 376

U.S. 528, 531-32, 84 S.Ct. 825, 827-28, 11 L.Ed.2d 887, 891 (1964). The majority of the jurisdictions considering this question have decided that no attack upon the veracity of an underlying affidavit may be made. See 68 Am. Jur.2d Searches and Seizures § 66 (1973). We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are more properly considered in a trial on the merits. See State v. Petillo, N.J. Supr., 293 A.2d 649 (1972), cert. denied, 410 U.S. 945, 93 S.Ct. 1393, 35 L.Ed.2d 611 (1973); Carter v. State Md. App., 337 A.2d 415 (1975).

Because of the resolution of this issue there is no need to consider defendant's other contentions, relating to the evidence that would have been introduced for impeachment purposes.

* * * *

Affirmed.